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**Question—Consideration.**—An assignment of error which raises merely a moot question need not be considered.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 430.]

Appeal from Circuit Court, Norfolk County.

Annexation proceedings by the City of Portsmouth. From decree of annexation, the County of Norfolk and the Southern Railway Company appeal. Amended and affirmed.

*A. B. Carney, E. R. F. Wells, and Williams, Tunstall & Thom*, all of Norfolk, for plaintiffs in error.

*Jno W. Happer*, of Portsmouth, and *S. Heth Tyler*, of Norfolk, for defendant in error.

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ROSENBERG *v.* TURNER.

March 27, 1919.

[98 S. E. 763.]

**1. Customs and Usages (§ 15 (1, 2)\*)—Construction of Words—“Excavate”—Parol Evidence.**—Ordinary words or phrases may by usage of trade acquire a restricted or limited meaning, and when they do, that meaning may be shown by parol evidence, and hence the word “excavate” as used in a building contract may be shown to be used in a certain locality to mean removal of dirt only and not stone.

[Ed. Note.—For other definitions, see Words and Phrases, Excavate. For other cases, see 13 Va.-W. Va. Enc. Dig. 412.]

**2. Contracts (§§ 152, 175 (1)\*)—Construction—Meaning of Words.**—Words in a contract are generally construed in their usual ordinary and popular sense, unless it can be legitimately shown in some way, that they were used in some other sense; the burden of showing this being always upon party alleging it.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 404.]

**3. Customs and Usages (§ 12 (1)\*)—Knowledge of Parties.**—A custom of trade in using a word in other than its ordinary sense, cannot change intrinsic character of contract of parties who are ignorant of such custom.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 410.]

**4. Appeal and Error (§ 237 (2)\*)—Objections in Lower Court—Reception of Evidence.**—Where evidence was admissible to show custom, and if followed by evidence sufficient to charge defendant with knowledge thereof would have affected contract involved, its reception will not be considered error; there being no motion to strike or instructions asked to disregard the evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 560.]

**5. Contracts (§ 198 (5)\*)—“Excavate.”**—The word “excavate” as

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ordinarily used in a construction contract covers the removal of solid rock, as well as earth and loose material.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 404.]

**6. Contracts (§ 285 (2)\*) — Architect's Determination — Extra Work.**—In a construction contract providing "that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be done or that has been performed under it, etc., the decision of the architect shall be final and binding on all parties hereto," gave to architect power to determine whether or not extra compensation should be paid by owner for work which contractor claimed was not covered by the contract.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 425· 6 Va.-W. Va. Enc. Dig. 1314.]

**7. Trial (§ 295 (5)\*)—Instructions.**—Two instructions presenting the two opposing theories of the parties should be read together to determine the sufficiency of either.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

**8. Trial (§ 267 (4)\*)—Instructions—Requested Instruction.**—The trial court may disregard all instructions tendered and give instructions of its own; and, if they correctly state the law covering all the phases of the case presented by the evidence and fairly submit the case to the jury without obscurity or ambiguity, no one can complain.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

**9. Contracts (§ 353 (11)\*)—Instructions — Extra Work.** — The court properly refused to instruct the jury not to find for plaintiff unless they "further believed from the evidence that defendant expressly agreed with plaintiff to pay for said excavation as an extra," the use of the word "expressly" being misleading, where one of claims of plaintiff was that a contract to pay for such work was created by implication.

Sims, J., dissenting in part.

Error to Hustings Court of Petersburg.

Action by W. R. Turner against Joseph L. Rosenberg. There was a judgment in favor of plaintiff, and the defendant brings error. Affirmed.

*Lassister & Drewery*, of Petersburg (*Joseph L. Rosenberg*, of counsel), for plaintiff in error.

*Charles Hall Davis* and *Paul Pettit*, both of Petersburg, for defendant in error.

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